

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONALD FAIRBANKS,

Defendant.

ORDER

12-cv-187-bbc
05-cr-39-bbc

Defendant Donald Fairbanks has filed a motion for post conviction relief under 28 U.S.C. § 2255. He asserts that he was denied the effective assistance of counsel. Unfortunately for defendant, he has filed his motion too late for it to be considered.

Section 2255 has a one-year period of limitations that begins running from the latest of (1) the date on which the defendant's conviction becomes final; (2) the date on which any impediment to the filing of the motion has been removed, provided that the impediment was an illegal one created by government action and one that actually prevented the defendant from filing his motion; (3) the date on which the right asserted was recognized initially by the Supreme Court, provided that the right was both newly recognized by the Court and

made retroactively applicable to cases on collateral review; or (4) the date on which the defendant could have discovered the facts supporting his claims through the exercise of due diligence. § 2255

Defendant was sentenced on June 1, 2006. The United States Court of Appeals affirmed defendant's judgment of conviction on July 15, 2008. Defendant did not petition for a writ of certiorari.

Under § 2255, defendant had one year from the date on which "the judgment of conviction [became] final" in which to bring a post conviction motion. The conviction would have become final 90 days after July 15, 2008 or October 13, 2008. Clay v. United States, 537 U.S. 529-30 (2003) (one-year statute of limitations does not begin to run until 90 days after time for filing petition for writ of certiorari has expired, even if defendant does not file such petition). Therefore, defendant had until October 13, 2009, in which to file a § 2255 motion unless he fits within one of the special circumstances in which the time for filing is extended. Defendant has not alleged any facts from which an inference may be drawn that any one of those special circumstances apply in his case, and I am aware of none. Therefore, I conclude that defendant's motion is untimely because it was not filed until March 14, 2012.

ORDER

IT IS ORDERED that defendant Donald Fairbanks's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED as untimely. Defendant is not entitled to a certificate of appealability because he has not made a substantial showing of the denial of a constitutional right.

Entered this 21st day of March, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge